

# Compelling Mentally Incompetent Persons to Arbitrate Claims: Why *Dusky* and *Drope* Should Apply

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## I. INTRODUCTION

The modern doctrine of competency came into being in mid-seventeenth century England, where, under the common law, an incompetent defendant could not be forced to stand trial.<sup>1</sup> Although most of the original rationales for employing the competency doctrine are now obsolete, several modern justifications support its continuing existence. In the United States, both criminal law and civil law recognize the value of the doctrine, and each has distinct legal standards for assessing competency. On the other hand, arbitration, a unique form of alternative dispute resolution that is often used as a substitute for a civil trial, appears to completely ignore the issue of competency. Currently, no rules or regulations exist that require a party to an arbitration proceeding to be competent before an arbitration proceeding begins. Because arbitration has never acknowledged competency nor adopted a specific test to actually assess competency, persons who would be declared mentally incompetent under civil competency standards may nevertheless be forced to adjudicate a civil claim in an arbitration proceeding. This may result in a mentally-ill party being subjected to a patently unfair proceeding due to a power imbalance created by differences in mental ability.

This note proposes that specific competency standards be put in place before a party is forced to submit to arbitration and explores options for an appropriate competency test or standard. First, this note outlines the history of the competency doctrine as well as modern standards of competency in both civil and criminal law, focusing on the criminal competency standards

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<sup>1</sup> Ronald Roesch, Patricia Zapf, Stephen Golding, & Jennifer Skeem, *Defining and Assessing Competency to Stand Trial*, in HANDBOOK OF FORENSIC PSYCHOLOGY 327–49 (Irving B. Weinger et al., eds., 2d ed. 1999).

the United States Supreme Court set forth in *Dusky v. United States*<sup>2</sup> and *Drope v. Missouri*.<sup>3</sup> Then this note addresses the relatively new field of arbitration, its basic principles, and the fact that arbitration lacks guidelines for how to respond to mentally incompetent parties. Because arbitration lacks the procedural safeguards that exist in civil proceedings, because parties to an arbitration have no legal right to appointed counsel, and because arbitration is binding and subject to limited appeal, this note proposes that competency standards are necessary in arbitration proceedings. Next, this note argues that the *Dusky–Drope* standard used in criminal law is the appropriate standard to be used in the arbitration context. Last, this note explores the ways in which the new competency standard might be implemented and properly enforced by arbitrators.

## II. THE ORIGINS OF THE COMPETENCY DOCTRINE

Competency to stand trial, long a part of legal due process, is a concept that arose early in criminal jurisprudence, allowing a person who is considered unable to participate in his or her defense on account of mental or physical illness to postpone trial.<sup>4</sup> In fact, the doctrine that bars the trial, conviction, or punishment of an incompetent criminal defendant has a long history in the American legal system.<sup>5</sup> Persons who are mentally retarded are included in this category. However, because the issues raised by mental retardation are distinct from those raised by mental illness and require different methods of testing for competency, this article analyzes problems of incompetency to stand trial resulting only from mental illness.<sup>6</sup>

Historically, English common law allowed an arraignment, trial, judgment, or execution of an alleged capital offender to be stayed if he or she

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<sup>2</sup> *Dusky v. United States*, 362 U.S. 402, 402 (1960).

<sup>3</sup> *Drope v. Missouri*, 420 U.S. 162, 172 (1975).

<sup>4</sup> *Id.* at 171.

<sup>5</sup> Stephen Golding et al., *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Interview*, 8 LAW & HUM. BEHAV. 321, 322 (1984). For a history of the rule, see, e.g., *Youtsey v. United States*, 97 F. 937, 940–44 (6th Cir. 1899) (“[I]t is fundamental that an insane person can neither plead to an arraignment, be subjected to a trial, or, after trial, receive judgment, or, after judgment, undergo punishment.”).

<sup>6</sup> Ronald Roesch & Patricia A. Zapf, *Defining and Assessing Competency to Stand Trial*, in HANDBOOK OF FORENSIC PSYCHOLOGY 327 (Irving B. Weiner et al. eds., 2d ed. 1999) (noting that mentally retarded defendants must be assessed using special tools and procedures).

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"be(came) absolutely mad."<sup>7</sup> Sir William Blackstone, renowned British judge and politician, reasoned that a person who became "mad" after committing an offense should not be arraigned for it "because he is not able to plead to it with that advice and caution that he ought."<sup>8</sup> Blackstone further opined that a defendant who becomes "mad" after the commission of an offense should not be tried, for "how can he make his own defense?"<sup>9</sup>

During the formation of the competency doctrine in England, self-representation, rather than representation by counsel, was the common practice.<sup>10</sup> In serious criminal cases, in fact, the law required the defendant to "appear before the court in his own person and conduct his own cause in his own words."<sup>11</sup> Therefore, in many cases, a defendant stood alone before the court. Because a defendant could be deprived of his liberty, or even his life, it was imperative that the defendant be competent.<sup>12</sup>

While today criminal defendants who face an actual penalty of imprisonment have a legal right to counsel, justifications remain for the modern competency doctrine.<sup>13</sup> Most importantly, maintaining the doctrine serves to prevent general "unfairness" to a criminal defendant or a civil litigant.<sup>14</sup> Ensuring competency in a criminal case also helps to prevent

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<sup>7</sup> Roesch et al., *supra* note 1, at 1.

<sup>8</sup> *Drope*, 420 U.S. at 171 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES \*24).

<sup>9</sup> Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 574 (1995).

<sup>10</sup> *Faretta v. California*, 422 U.S. 806, 823 (1975). For an analysis of the historical origins of the right to counsel, see Bruce J. Winick, *Forfeiture of Attorneys' Fees Under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 786-99 (1989).

<sup>11</sup> *Faretta*, 422 U.S. at 823 (quoting 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 211 (2d ed. 1909)).

<sup>12</sup> *Id.*

<sup>13</sup> See generally *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that defendants in federal court who face an actual penalty of imprisonment have a right to appointed counsel). For an understanding of a criminal defendant's right to counsel under state law, see *Gideon v. Wainwright*, 372 U.S. 335 (1963) (in which the United States Supreme Court unanimously ruled that state courts are required under the Sixth Amendment of the United States Constitution to provide counsel in criminal cases for indigent defendants).

<sup>14</sup> Winick, *supra* note 9, at 575-76. See also Caleb Foote, *A Comment on Pre-Trial Commitment of Criminal Defendants*, 108 U. PA. L. REV. 832, 834 (1960) (noting that some scholars view the common-law competency rule as a rule that "did not evolve from philosophical notions of punishability, but rather has deep roots in the common law as a by-product of the ban against trials *in absentia*; the mentally incompetent defendant,

erroneous convictions that might result from requiring a defendant to stand trial while significantly impaired by mental illness.<sup>15</sup> Further, a person who is mentally impaired may not be able to communicate critical facts to counsel or the court.<sup>16</sup> The competency doctrine also preserves the dignity of the trial process, which would be threatened by trying persons “who lack a meaningful understanding of the nature of the proceedings.”<sup>17</sup> Preserving the competency doctrine thus ensures public respect and confidence in the judicial process and legal system.<sup>18</sup> For these reasons, the Supreme Court has held that the bar against trying an incompetent defendant is “fundamental to an adversary system of justice.”<sup>19</sup>

### III. MODERN COMPETENCY STANDARDS

In the United States today, the test for competency depends on the nature of the proceeding. Specifically, criminal law has different standards and tests for competency than civil law, perhaps due to the basic differences between criminal and civil law. Criminal law involves the prosecution of an individual by the government for any act that has been classified as a crime.<sup>20</sup> As punishment, persons convicted of crimes may face fines, jail time, capital punishment, or a combination of these punishments.<sup>21</sup> In contrast, civil law involves individuals or organizations who are seeking to resolve private legal disputes.<sup>22</sup> Generally, persons found liable in a civil case may not be incarcerated; however, they may have to pay money or give up property.<sup>23</sup> In the realm of contract-based civil litigation, persons found guilty of a breach of contract may have to pay damages or restitution to another party, or may be forced to perform in accordance with the terms of the contract (specific performance) or to refrain from action (injunction).<sup>24</sup>

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though physically present in the courtroom, is in reality afforded no opportunity to defend himself”).

<sup>15</sup> Winick, *supra* note 9, at 575.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 576.

<sup>18</sup> *Id.*

<sup>19</sup> *Drope*, 420 U.S. at 172.

<sup>20</sup> CORNELL UNIVERSITY LAW SCHOOL LEGAL INFORMATION INSTITUTE, [http://topics.law.cornell.edu/wex/Criminal\\_law](http://topics.law.cornell.edu/wex/Criminal_law) (last visited March 30, 2011).

<sup>21</sup> *See id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See* 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 55.1 (2005).

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The law regarding competency is significantly more developed in the criminal context, where judges have the benefit of a wealth of U.S. Supreme Court precedent that has created specific competency standards. While judges in the civil realm are not completely without guidance, the case law is inchoate, and only one of the Federal Rules of Civil Procedure guides judges on the issue of competency.

### *A. Competency in Criminal Law: Dusky and Drope*

It is well established that convicting an accused person while he is legally incompetent violates due process.<sup>25</sup> However, it was not until *Dusky v. United States* that the Supreme Court of the United States, in a per curiam opinion, established the standard of competency required to be found fit to proceed to criminal trial.<sup>26</sup> To properly stand trial under *Dusky*, a defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and must also have “a rational as well as factual understanding of the proceedings against him.”<sup>27</sup> In *Drope v. Missouri*, the Supreme Court refined this standard by holding that a defendant must not only be able to understand the nature of the proceedings against him and consult with counsel but must also be able to “assist in preparing his defense” to properly stand trial.<sup>28</sup>

Altogether, *Dusky* and *Drope* resulted in a three-part scheme for determining mental competency to stand trial. First, a court must determine, by a preponderance of the evidence, whether the defendant suffers from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to consult with his lawyer with a reasonable degree of rational understanding. The second question before a court is whether the defendant presently has a rational and factual understanding of the proceedings against him. Third, a court must determine whether the defendant has the present ability to assist in preparing his own defense.

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<sup>25</sup> *Pate v. Robinson*, 383 U.S. 375, 378 (1966). In that case, the Court, citing *Bishop v. United States*, 350 U.S. 961 (1956), noted that “[i]n the event a sufficient doubt exists as to his present competence such a hearing must be held” and that “the conviction of an accused person while he is legally incompetent violates due process.”

<sup>26</sup> *Dusky*, 362 U.S. at 402.

<sup>27</sup> *Id.* See also *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996) (holding that “[t]he test for competence to stand trial . . . is whether the defendant has the present ability to understand the charges against him and communicate effectively with defense counsel.”).

<sup>28</sup> See *Drope*, 420 U.S. at 171.

While *Dusky* and *Drope* address a defendant's competency to stand trial, criminal law also recognizes other forms of legal competency. Some competencies recognized in criminal law include: the capacity to knowingly waive *Miranda* rights prior to questioning by law enforcement officers, competency to plead guilty, and competency to stand trial.<sup>29</sup> All of the different "types" of legal competencies, however, have in common a "reference to human capacities that must be assessed in the process of applying legal criteria for competency decisions."<sup>30</sup> As the Court in *Drope* noted, "Whether a defendant is capable of understanding the proceedings and assisting counsel is dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his competence."<sup>31</sup> None of these factors alone, however, is determinative, but any one of them is sufficient to raise a reasonable doubt about a defendant's competence.<sup>32</sup>

Generally, courts do not expect defendants to be absolute "paragons of mental health."<sup>33</sup> Therefore, a defendant may be suffering from a diagnosed psychiatric disorder such as schizophrenia, or may have a serious physical illness that affects mental capacity, and may still be found competent to stand trial.<sup>34</sup>

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<sup>29</sup> THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* 2 (1986).

<sup>30</sup> *Id.* at 7.

<sup>31</sup> *Drope*, 420 U.S. at 180; *see also* 18 U.S.C. § 4241 ("[t]he defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is *unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.*") (emphasis added).

<sup>32</sup> *Drope*, 420 U.S. at 180. *See also* *Miles v. Stainer*, 108 F.3d 1109, 1112 (9th Cir. 1997) (in a case in which a criminal defendant had been evaluated by three doctors previous to trial, who had noted that the defendant had past problems with competency and consistently failed to take his psychotropic medication, the Ninth Circuit found that the lower court erred in failing to assess his competency, noting that "[s]ince the state court file contained doctors' warnings that Miles' competence depended on medication which he often refused to take, it was incumbent upon the state trial judge to ask him whether he had been taking his medication before accepting his guilty plea").

<sup>33</sup> *Golding et al.*, *supra* note 5, at 322.

<sup>34</sup> *Id.*

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### B. Competency in Civil Law: Rule 17's Under-Enforced Standard

Although in practice it is generally unenforced, civil law imposes a ban allowing an incompetent individual to sue or be sued.<sup>35</sup> The Federal Rules of Civil Procedure require litigants who are deemed to have mental health issues to have counsel or a guardian *ad litem* before proceeding with any lawsuit.<sup>36</sup> Specifically, Rule 17 of the Federal Rules provides that “the court must appoint a guardian *ad litem* [for an] . . . incompetent person . . . who is unrepresented in an action . . . .”<sup>37</sup> Under the Federal Rules of Civil Procedure, the capacity of one to sue as a representative of another is usually determined by state law.<sup>38</sup>

Legal competencies that are recognized in civil cases generally require logical decisions based substantially on a person's physical or psychological capabilities.<sup>39</sup> For example, competencies recognized in civil law include, among others, parental competency, competency to care for self or care for property, competency to enter into a contract, and competency to execute a will.<sup>40</sup>

Rule 17 also addresses the due process concerns that exist in the civil realm. As the Sixth Circuit stated, “Whereas due process protects incompetent criminal defendants by imposing an outright prohibition on trial, it protects incompetent civil parties by requiring the court to appoint guardians to protect their interests and by judicially ensuring that the

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<sup>35</sup> See FED. R. CIV. P. 17(c); see also 53 AM. JUR. 2D *Mentally Impaired Persons* § 158 (2006) (noting that “although an incompetent person may have suffered an injury, and thus have a justiciable interest in the controversy,” such person lacks the legal authority to sue, and because of this, the law grants another party the capacity to sue on his or her behalf).

<sup>36</sup> See *id.*; see also *Wesla Fed. Credit Union v. Henderson*, 655 So. 2d 691, 694 (La. Ct. App. 1995) (holding that a mentally incompetent person has no procedural capacity to be sued, and that a curator appointed by state court was a proper defendant in an action to enforce an obligation against a mental incompetent).

<sup>37</sup> FED. R. CIV. P. 17(c) (stating that only four categories of individuals may sue or defend on behalf of a minor or an incompetent person: a general guardian, a committee, a conservator, or a “like” fiduciary, and also that “[a] minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian *ad litem*. The court must appoint a guardian *ad litem*—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.”).

<sup>38</sup> See *Thomas v. Humfield*, 916 F.2d 1032, 1035 (5th Cir. 1990); see also *in re Kjellsen*, 53 F.3d 944, 946 (8th Cir. 1995).

<sup>39</sup> See *Grisso*, *supra* note 29, at 5.

<sup>40</sup> *Id.*

guardians protect those interests.”<sup>41</sup> Therefore, even in the absence of Rule 17’s mandate, due process considerations have supported conducting an inquiry into competency.<sup>42</sup>

Unfortunately, Rule 17 does not technically require or obligate courts to assess competency.<sup>43</sup> In *Ferelli v. River Manor Health Care Center*, the Second Circuit, noting that a judgment that is entered against a mentally incompetent defendant who is represented by a guardian or a guardian *ad litem* may be “subject to collateral attack at a later date,” further stated that:

[a]lthough we do not find that Rule 17(c) *requires* courts to inquire into the necessity of appointing a guardian *ad litem* absent verifiable evidence of mental incapacity, we also note that nothing in that rule prevents a district court from exercising its discretion to consider *sua sponte* the appropriateness of appointing a guardian *ad litem* for a litigant whose behavior raises a significant question regarding his or her mental competency.<sup>44</sup>

As for *pro se* litigants, the *Ferelli* court held that “absent actual documentation or testimony by a mental health professional, a court of record, or a relevant public agency, the district court is not required to undertake an inquiry into a *pro se* litigant’s mental capacity.”<sup>45</sup>

Further, Rule 17 provides no guidance regarding the specific circumstances that warrant a mental competency inquiry, or whether a *pro se*

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<sup>41</sup> United States v. Mandycz, 447 F.3d 951, 962 (6th Cir. 2006) (citing *Schneiderman v. United States*, 320 U.S. 118, 160 (1943)); *see also* *Berrios v. N.Y. City Hous. Auth.*, 564 F.3d 130, 134 (where owner of claim is an incompetent person, unless that claimant is properly represented by guardian *ad litem*, friend, or other suitable fiduciary, and that representative is an attorney or is represented by an attorney, a court should not issue a ruling as to whether complainant states a claim upon which relief can be granted).

<sup>42</sup> *See Ferelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 203 (2d Cir. 2003) (holding that due process considerations attend incompetency finding and subsequent appointment of guardian *ad litem* under rules of civil procedure); *see also* *Thomas v. Humfield*, 916 F.2d 1032 (5th Cir. 1990) (indicating that, as to the question of minimum due process protections in determining whether an individual is incompetent to sue or defend, a court is not required to use a domiciliary state’s procedures for determining competency or capacity because the court may use any procedure meeting the requirements of due process).

<sup>43</sup> *See Ferelli*, 323 F.3d at 203.

<sup>44</sup> *Id.* (emphasis added).

<sup>45</sup> *Id.* at 202.



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plaintiff should receive special consideration.<sup>46</sup> Because courts are not mandated to inquire into a *pro se* litigant's competency, and because guidelines for circumstances which would warrant such an inquiry are non-existent, it is probable that an incompetent person may be forced to adjudicate a civil claim despite the Federal Rules' concern for civil competency.<sup>47</sup>

Even when courts do address the question of competency, however, they have generally been reluctant to find an individual incompetent to pursue a legal action or to be sued civilly and seem to impose a high standard for a person to qualify as incompetent.<sup>48</sup> For example, in one case, the United States District Court for the Eastern District of Michigan held that, according to Michigan state law, a person may not be assumed incompetent "merely because" he or she is in a mental hospital.<sup>49</sup> Therefore, even if a court does inquire into a civil litigant's competency, a litigant who is *psychologically* unfit to litigate may nevertheless be forced to adjudicate his claim because of the fact that courts impose such high standards for reaching the status of *legal* incompetency.<sup>50</sup>

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<sup>46</sup> See *Jacobs v. Cnty. of Westchester*, 2005 WL 2172254, at \*1 (2d Cir. Sept. 7, 2005) (holding that a district court has no obligation to inquire *sua sponte* into *pro se* plaintiff's mental competence, even when court observes behavior that may suggest mental incompetency).

<sup>47</sup> See *id.*

<sup>48</sup> See *Yacobonis v. Gilvickas*, 101 A.2d 690, 692 (Pa. Sup. Ct. 1954) (stating that "[a]n adjudication of incompetency is not an adjudication of lunacy" and that "if the defense wants to excuse the absence of defendant at the trial, it must actually be shown that he is incapable of testifying").

<sup>49</sup> *Huebner v. Ochberg*, 87 F.R.D. 449, 456 (E.D. Mich. 1980) ("No determination that a person requires treatment, no order of court authorizing hospitalization or alternative treatment, nor any form of admission to a hospital shall give rise to a presumption of, constitute a finding of, or operate as an adjudication of legal incompetence.").

<sup>50</sup> See *Walker v. Frericks*, 354 S.E.2d 915, 919 (S.C. Ct. App. 1987) (indicating courts' general reluctance to find individuals legally incompetent in civil cases, and indicating that this reluctance may be due to courts' concern in ensuring that a *guardian ad litem* is not appointed to a competent person, as this would deprive them of the right to control their own litigation); see also *Graham v. Graham*, 240 P.2d 564, 566 (Wash. 1952) ("There is something fundamental in the matter of a litigant being able to use his personal judgment and intelligence in connection with a lawsuit affecting him, and in not having a guardian's judgment and intelligence substituted relative to the litigation affecting the alleged incompetent.").

### C. Competency in Contract Law: Strict Competency Requirements

General rules of contract law stipulate that a party must be competent in order to enter into a legally binding contract.<sup>51</sup> The Restatement (Second) of Contracts, for example, provides that “a natural person who manifests or consents to a transaction has full legal capacity to incur contractual duties unless he or she is under guardianship, an infant, mentally ill or defective, or intoxicated.”<sup>52</sup>

Contract law currently recognizes that there are a wide variety of mental incompetencies such as congenital deficiencies in intelligence, mental deterioration due to old age, effects of brain damage, and mental illnesses evidenced by symptoms such as delusions, hallucinations, delirium, confusion, and depression.<sup>53</sup> However, according to the Restatement, if a person has not been deemed incompetent and appointed a guardian, that party is presumed to be competent to enter into a contract.<sup>54</sup> Further, where

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<sup>51</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981) (stating that “(1) A person incurs only *voidable* contractual duties by entering into a transaction if by reason of mental illness or defect (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition”) (emphasis added); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 12 (1)–(2) (1981) (stating that “No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.”).

<sup>52</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 12 (2) (1981); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. a (1981) (stating that “[c]apacity . . . means the legal power which a normal person would have under the same circumstances” and that “[i]ncapacity may be total, as in cases where extreme physical or mental disability prevents manifestation of assent to the transaction, or in cases of mental illness after a guardian has been appointed” and also that “[i]ncapacity sometimes relates only to particular types of transactions; on the other hand, persons whose capacity is limited in most circumstances may be bound by particular types of transactions.”).

<sup>53</sup> RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. b (1981).

<sup>54</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. b (1981) (“[w]here no guardian has been appointed, there is full contractual capacity in any case unless the mental illness or defect has affected the particular transaction: a person may be able to understand almost nothing, or only simple or routine transactions, or he may be incompetent only with respect to a particular type of transaction . . . . Where a person has some understanding of a particular transaction which is affected by mental illness or defect, the controlling consideration is whether the transaction in its result is one which a reasonably competent person might have made.”).

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there has been no previous adjudication of incompetency, the burden of proof is on the party asserting the incompetency.<sup>55</sup>

This note, however, is not concerned with the hypothetical situation in which a party has entered into a contract that is voidable by reason of incapacity to contract. Instead, this note is concerned with the question of whether contract law considers competency when it comes to *performance* of a contract. Specifically, this note addresses the situation in which a party has entered into a contract which contains a binding arbitration clause, has entered into said contract with full legal capacity to do so, and later becomes mentally ill. Simply put, this note addresses the question of whether a party who validly entered into a contract to arbitrate must participate in the arbitration proceeding if that party became mentally ill before the arbitration proceeding.

While contract law is, in a sense, the “child” of general civil law, contract law differs from general civil law slightly in its treatment of mentally-ill parties. In the situation of mentally incompetent parties who have entered into a legally enforceable contract, the Restatement (Second) of Contracts states:

Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance [due to mental disease or defect] . . . terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief *as justice requires*.<sup>56</sup>

While the Restatement is not explicit on this point, it seems to imply that if a person becomes mentally ill after having entered into a valid contract, and if allowing the mentally ill party to avoid performing his contractual duties would be “unjust,” a court may force the mentally ill person to comply with his contractual duties.

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<sup>55</sup> RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. c (1981) (stating that, for proof of incompetency, “[p]roof of irrational or unintelligent behavior is essential; almost any conduct of the person may be relevant, as may lay and expert opinions and prior and subsequent adjudications of incompetency. Age, bodily infirmity or disease, use of alcohol or drugs, and illiteracy may bolster other evidence of incompetency. Other facts have significance when there is mental illness or defect but some understanding: absence of independent advice, confidential or fiduciary relationship, undue influence, fraud, or secrecy . . .”).

<sup>56</sup> RESTATEMENT (SECOND) OF CONTRACTS § 15(2) (1981) (emphasis added).

The rationale behind the rule, as the comments to the Restatement (Second) of Contracts explain, stems from two important but conflicting policy concerns.<sup>57</sup> First, the law strives to protect “justifiable expectations and . . . security of transactions.”<sup>58</sup> An important competing concern, however, is to protect persons who are “unable to protect themselves against imposition.”<sup>59</sup> However, because courts may grant relief “as justice requires,” it is up to individual courts to determine which of the competing policy concerns is the most compelling in any given case.<sup>60</sup>

The Restatement also addresses the situation in which an incompetent person regains full capacity at a later date. In that case, the newly competent individual may affirm or disaffirm the contract, or the power to affirm or disaffirm may be exercised on his behalf by a guardian or after his death by personal representative.<sup>61</sup> However, there may be related obligations imposed by law independently of contract which cannot be disaffirmed.<sup>62</sup>

Overall, contract law is concerned with fairness and resolves any questions regarding mental competency either to enter into a contract or to execute contractual duties under the purview of what is most equitable for all parties involved.

#### IV. COMPETENCY AND ARBITRATION

Arbitration, a relatively unique form of alternative dispute resolution, has grown in appeal in recent years as a substitute for civil court-based litigation. Perhaps due to its immaturity in the legal world, arbitration has yet to set any standards relating to a disputant’s competency, and seems to presume from

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<sup>57</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. a (1981).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> See *id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. a:

[E]ach policy has sometimes prevailed to a greater extent than is stated . . . at one extreme, it has been said that a lunatic has no capacity to contract because he has no mind; this view has given way to a better understanding of mental phenomena and to the doctrine that contractual obligation depends on manifestation of assent rather than on mental assent . . . [a]t the other extreme, it has been asserted that mental incompetency has no effect on a contract unless other grounds of avoidance are present, such as fraud, undue influence, or gross inadequacy of consideration; it is now widely believed that such a rule gives inadequate protection to the incompetent and his family, particularly where the contract is entirely executory.

<sup>61</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 15 cmt. d.

<sup>62</sup> See *id.*

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the outset that parties to an arbitration proceeding are indeed competent. Competency standards are vitally necessary, however, because of the lack of procedural safeguards in the arbitration process, because parties have no constitutional right to counsel, and because arbitration is almost always binding and subject to very limited appeal.

### *A. Arbitration: Purpose and Process*

Arbitration has been defined as “a process in which the neutral [party] hears evidence and renders a decision on the merits in a manner similar to court adjudication.”<sup>63</sup>

Procedurally, an individual has technically entered into an “arbitration agreement,” or a “submission to arbitration,” whenever two or more persons have agreed that a dispute or a potential dispute between them may be decided in a legally binding way by an impartial party or parties upon evidence presented.<sup>64</sup> The disputed issue is then presented before a neutral party, who may be selected by the parties.<sup>65</sup> The neutral party, the arbitrator, makes a decision, which is called an award.<sup>66</sup>

There is no doubt that this unique process of arbitrating claims has grown in appeal as a substitute for court-based litigation.<sup>67</sup> As stated by Chief Justice Warren E. Burger at a meeting of the American Arbitration Association, “In terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases.”<sup>68</sup> Because arbitration clauses are now the standard method for resolving disputes in many consumer contracts, such as insurance and medical contracts, almost

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<sup>63</sup> MARK PARTRIDGE, *ALTERNATIVE DISPUTE RESOLUTION: AN ESSENTIAL COMPETENCY FOR LAWYERS* 38 (Oxford University Press 2009).

<sup>64</sup> RONALD BERNSTEIN & DEREK WOOD, *HANDBOOK OF ARBITRATION PRACTICE* 9 (Sweet and Maxwell 1993) (1987).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See PARTRIDGE, *supra* note 63, at 9–10 (citing a 2006 American Bar Association study which found that only 15% of the Fortune 1000 companies interviewed favored litigation over ADR, and that 58% of respondents to the study believed that arbitration reduced costs); see also PARTRIDGE, *supra* note 63, at 6–7 (noting that a study of general counsel reported in the October 2004 issue of *Corporate Legal Times* indicated that 40% of clients favored arbitration, and 60% favored mediation over court litigation as a means to resolve commercial disputes).

<sup>68</sup> *Id.* at 71 (citing *AAA Looks at the Next Century*, AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON COMMERCIAL ARBITRATION 8–9 (Thomas E. Carbonneau et al., eds., 2006)).

everyone enters into an agreement to arbitrate at some point during their lifetime, whether aware of it or not.<sup>69</sup>

Generally, litigants who independently choose arbitration as a method of resolving a dispute do so due to the high costs, adversarial nature, and time requirements of traditional litigation.<sup>70</sup> One of the oft-cited benefits of arbitration is that it offers a binding result whereby the parties must comply with the decision of the arbitrator; however, some arbitration schemes may produce a nonbinding result in which compliance with the decision depends solely on the cooperation of the losing party.<sup>71</sup> Another regularly cited benefit of arbitration is that arbitrators may be selected based on special knowledge of an industry or based on knowledge of applicable law.<sup>72</sup> This may be beneficial in certain circumstances, because a judge in a courtroom generally has no special knowledge of the subject matter underlying any given case.<sup>73</sup> Further, a litigant who is concerned with confidentiality may prefer arbitration over civil litigation as arbitration hearings, as opposed to court hearings, are private and can be kept confidential.<sup>74</sup>

However, not all scholars have such a positive outlook on arbitration, and have voiced concerns on the policy level about the privatization aspect of arbitration specifically, and alternative dispute resolution generally.<sup>75</sup> For

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<sup>69</sup> Michelle Canerday, *Alternative Dispute Resolution: The Federal Arbitration Act and Resolving Disputes in Arbitration Versus a Court Proceeding*, 81 DENV. U. L. REV. 597, 597 (2004); see also John D. Feerick, *Toward Uniform Standards of Conduct for Mediators*, 38 S. TEX. L. REV. 455, 456 (1997) (noting that alternative dispute resolution is currently being employed in many different areas of law, such as consumer disputes, employer disputes, public policy conflicts, and business and commercial disputes).

<sup>70</sup> See Feerick, *supra* note 69, at 456 (emphasizing the growing popularity of arbitration and noting that more than half of the states have “formally incorporated ADR methods other than arbitration into their systems through statewide legislation, court rules, or policies” and that most states offer mediation for family issues such as custody, visitation, and divorce. Feerick also notes that “virtually every state has experimented with ADR in one or more of its courts” and that “[a]t the federal level, eighty out of ninety-four district courts have established some form of ADR program.” (citing *House Considers New Court Arbitration Bill*, WORLD ARB. & MEDIATION REP., June 1995, at 119).

<sup>71</sup> PARTRIDGE, *supra* note 63, at 43.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> Jean Sternlight, *Is Alternative Dispute Resolution Consistent with the Rule of Law? Lessons from Abroad*, 56 DEPAUL L. REV. 569, 570 (2007) (noting other concerns scholars share regarding the use of Alternative Dispute Resolution, such as that treating disputes as matters of individual concern may serve to eliminate public accountability,

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example, critics state that the privatization of dispute resolution is problematic because public trials and published opinions are necessary to “protect and enhance individual rights” and because treating disputes as private matters eliminates public accountability and may increase the expression and impact of prejudice.<sup>76</sup> It is notable, however, that while scholars have criticized many aspects of arbitration, there is a general lack of scholarly work criticizing mental competency standards in arbitration proceedings.

### *B. Arbitration Without Competency Standards: Comparison to Civil Trial*

Although civil trials and arbitration are similar in that they both strive to create resolutions for civil claims, important and pertinent differences exist which must be further explored. Due to these critical differences, this note argues that parties to an arbitration are generally deprived the benefit of certain procedural protections which would be afforded to civil litigants.

#### *1. Arbitration Lacks the Procedural Safeguards That Exist in Civil Proceedings*

The arbitration process is intended to be relatively informal, as opposed to trial, which is a highly formalized process meant to protect vulnerable parties and result in a just and “fair” result.<sup>77</sup> While court hearings are governed by the rules of civil procedure applicable to that court, arbitration is governed by applicable rules of arbitration institutions and provider organizations, such as the National Academy of Arbitrators, the American Arbitration Association, and JAMS.<sup>78</sup> The Federal Arbitration Act provides

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and that alternative dispute resolution, when privatized, fails to serve an “important educational function.”).

<sup>76</sup> *Id.* See also Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165, 170–76 (2003) (discussing the community justice, court administration, and business interest strands of the alternative dispute resolution movement, and noting that the establishment of dispute resolution processes may weaken the position of less powerful members of society).

<sup>77</sup> See Theodore O. Rogers, Jr., *The Procedural Differences Between Litigating in Court and Arbitration: Who Benefits?*, 16 OHIO ST. J. ON DISP. RESOL. 633, 634 (2001).

<sup>78</sup> PARTRIDGE, *supra* note 63, at 38.

the legal framework for those disputes that arise out of interstate commerce.<sup>79</sup>

While the precise characteristics of arbitration proceedings differ from jurisdiction to jurisdiction, in general, a party to an arbitration proceeding does not have the same right to pre-trial discovery procedures to which civil litigants are afforded.<sup>80</sup> In arbitration, discovery is the exception, not the norm.<sup>81</sup> In fact, courts may not order discovery in aid of arbitration unless the movant has demonstrated “extraordinary circumstances” or special need or hardship.<sup>82</sup> Although arbitration pleading requirements are more lenient than those in court, depositions are much more limited in arbitration.<sup>83</sup> As to the arbitration proceeding itself, it lacks the strict rules of evidence and procedure by which a court is bound.<sup>84</sup> Further, arbitrators generally prefer to hear all available evidence, even if that evidence might be prejudicial or irrelevant.<sup>85</sup> Also, in-court trials have one very important feature that arbitration does not: an impartial and carefully selected jury.<sup>86</sup>

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<sup>79</sup> *Id.* at 155.

<sup>80</sup> *See* *Miller Brewing Co. v. Ft. Worth Distrib. Co. Inc.*, 781 F.2d 494, 498 (5th Cir. 1986); *see also* *Graig Shipping Co. v. Midland Overseas Shipping Corp.*, 259 F. Supp. 929, 931 (S.D.N.Y. 1966) (stating that a party “may not invoke arbitration and yet seek pre-trial discovery going to the merits. . . . [A]ny attempt to go to the merits and to retain still the right to arbitration is clearly impermissible”); *Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co.*, 20 F.R.D. 359, 361 (S.D.N.Y. 1957) (“[B]y voluntarily becoming a party to a contract in which arbitration was the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations.”).

<sup>81</sup> *See* *Greenstreet, Inc. v. Checks Are Us*, 806 So. 2d 1203, 1207 (Ala. 2001) (noting the difficulty in harmonizing the fact that arbitration is a method of dispute resolution where discovery is not the norm, and the fact that hearings without adequate time for discovery “are inappropriate.”).

<sup>82</sup> *See* *Hendler & Murray v. Lambert*, 147 A.D.2d 442, 443 (2d Dep’t 1989); *see also* *Balfour, Guthrie & Co., Ltd. v. Commercial Metals Co.*, 93 Wash. 2d 199, 204 (1980); *Thomas O’Connor & Co., Inc. v. Ins. Co. of N. Am.*, 697 F. Supp. 563, 567 (D. Mass. 1988); *Gresham v. Norris*, 304 F. Supp. 2d 795, 796 (E.D. Va. 2004).

<sup>83</sup> *See* *Rogers*, *supra* note 77, at 635.

<sup>84</sup> *Id.* at 637; *see also* *Geraldine Scott Moohr, Opting In Or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L. Q. 1087, 1093 (1999).

<sup>85</sup> *Moohr*, *supra* note 84, at 1093 (noting that parties to an arbitration may stipulate to any procedures, including the scope of judicial review, but that adding procedures that mimic those available in litigation will add costs and “forfeit[] finality,” which are the very defining characteristics of arbitration); *see also* *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (noting parties may stipulate to whatever procedures they want, “short of authorizing trial by battle or ordeal or, more doubtfully,



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Because arbitration is a “creature of contract” and, therefore subject to stipulations, parties to an arbitration proceeding are able to circumvent the procedural traditions described above, such as the default rules of discovery and evidence.<sup>87</sup> However, despite the fact that parties to an arbitration proceeding have the ability to change these default rules, it is doubtful that mentally incompetent people will realize that they may implement procedures which mimic those available in litigation.<sup>88</sup>

### 2. *Parties to an Arbitration Have No Constitutional Right to Counsel*

The lack of competency standards in arbitration is particularly egregious because a party to an arbitration proceeding has no constitutional or contractual right to counsel.<sup>89</sup> Looking to competency standards in criminal law can help illustrate exactly why the lack of competency standards in arbitration is so egregious.

In the criminal context, the United States Supreme Court has interpreted the Sixth Amendment to the United States Constitution as mandating that indigent defendants in federal court be provided counsel unless that right is “competently and intelligently waived.”<sup>90</sup> The Court has also extended this rule to the states via the Fourteenth Amendment.<sup>91</sup>

The Court held in *Indiana v. Edwards* that the “Constitution permits States to insist upon representation by counsel for those competent enough to stand trial under *Dusky* but who still suffer from severe mental illness to the

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by a panel of three monkeys”); *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997) (holding that a court must honor an arbitration agreement under which parties agreed to a standard of judicial scrutiny exceeding that allowed by Federal Arbitration Act).

<sup>86</sup> Rogers, *supra* note 77, at 638.

<sup>87</sup> Moohr, *supra* note 84, at 1093.

<sup>88</sup> See *id.*

<sup>89</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 340–43 (1963); see also *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

<sup>90</sup> *Gideon*, 372 U.S. at 340; see also U.S. CONST. amend. VI, which provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” In *Gideon*, the Court explained that this should be construed to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.

<sup>91</sup> *Gideon*, 372 U.S. at 340.

point where they are not competent to conduct trial proceedings by themselves.”<sup>92</sup>

In *Edwards*, the Court noted that “[m]ental illness itself is not a unitary concept,” which suggested that a single standard for competency to go to trial and competency to proceed *pro se* may be inappropriate.<sup>93</sup> The Court also questioned whether allowing mentally-ill defendants to represent themselves would undermine their dignity and result in a spectacle rather than a fair trial.<sup>94</sup> Therefore, the Court held that the Constitution supports a higher competency standard for proceeding *pro se* than for proceeding to trial with representation.<sup>95</sup>

Although the Court in *Edwards* endorsed applying a higher competency standard for *pro se* defendants, it did not endorse Indiana’s proposed standard for self-representation competency and failed to propose its own standard for self-representation competency.<sup>96</sup> Because of the lack of a proposed standard, some scholars have noted that the *Edwards* decision is problematic for several reasons.<sup>97</sup> First, it not only allows paternalism to rule judicial decisions, but it also allows judges to decide whether someone is

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<sup>92</sup> *Indiana v. Edwards*, 554 U.S. 164, 178 (2008). *Edwards* illustrates that competency is not a static concept. In that case, defendant Edwards drew and fired a gun at a store security officer after attempting to steal two pairs of shoes. Procedurally, Edwards underwent three competency hearings, two trials, and two determinations of his right to self-representation. However, at both criminal trials, Edwards was found competent to stand trial but not to represent himself. The United States Supreme Court held that the lower court chose a higher standard of competency for self-representation than the Court itself endorsed.

<sup>93</sup> Anne S. Kimbol, *Competency Does Not Always Mean Competency. According to the Supreme Court*, HEALTH LAW PERSPECTIVES (Aug. 4, 2008, 10:09 am) <http://www.law.uh.edu/healthlaw/perspectives/2008/%28AK%29%20Edwards.pdf> (citing *Edwards*, 554 U.S. at 175).

<sup>94</sup> *Id.* (citing *Edwards*, 554 U.S. at 176).

<sup>95</sup> *Id.* (citing *Edwards*, 554 U.S. at 176–78) (Scalia, J., dissenting) (opining that the Constitution grants rights to a defendant who knowingly and voluntarily waives the right to counsel to represent himself, and that there is no leeway implicit in that right for states to substitute their own judgment for that of the defendant with respect to the right to counsel).

<sup>96</sup> *Id.* (Scalia, J., dissenting) (questioning the Court’s paternalism in even addressing the question of a defendant’s dignity and its willingness to set a higher standard based on an appearance of a less fair trial, and noting that the majority’s failure to establish a standard for determining competency *pro se* “makes a bad holding worse”).

<sup>97</sup> See generally Kimbol, *supra* note 93 (noting that while the law post-*Edwards* makes clear there is a higher standard for self-representation when proceeding to trial, it fails to give guidance as to what that higher standard is).

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competent to represent himself based on a mental health history.<sup>98</sup> Further, it limits the ability of someone with a history of mental illness to rid herself of an attorney who refuses to listen to suggestions regarding her defense.<sup>99</sup> All in all, the *Edwards* decision has been criticized for creating the potential for the proverbial “slippery slope.”<sup>100</sup>

*Edwards* is particularly influential in the arbitration context, because, as stated, parties to an arbitration have no legal right to counsel unless that right has been included in the contract to arbitrate. Because of this, those who are forced to proceed *pro se* are not only at a distinct disadvantage because of power imbalances between parties, but also because, drawing from the Court’s reasoning in *Edwards*, proceeding *pro se* may undermine that party’s dignity and further undermine the process of the arbitration itself.<sup>101</sup>

Although *Edwards* did not propose any specific standard to determine a *pro se* defendant’s mental competency, a parallel can be drawn from the reasoning set forth in *Edwards* for creating a higher competency standard for *pro se* defendants and for setting a higher standard in similar situations in civil law proceedings, such as arbitration. Arbitration shares similar policy reasons with criminal law for creating higher competency standards for a *pro se* litigant, some of which are noted in the *Edwards* decision.<sup>102</sup> For example, arbitration certainly wishes to preserve a party’s dignity and to provide them with a fair proceeding. However, as the Court in *Edwards* noted, a *pro se* litigant may receive an unfair trial and that litigant’s dignity may be compromised if said litigant’s competency is not assessed by specific standards.<sup>103</sup>

### 3. Arbitration is Binding and Subject to Limited Appeal

The lack of competency standards in arbitration is problematic because arbitration awards are almost always binding.<sup>104</sup> In fact, after an arbitrator rules, generally no reason is given for any decision and the decision is

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See *Edwards*, 554 U.S. at 176 (indicating that the dignity and autonomy of an individual underlie the right of self representation, and that an incompetent defendant who proceeds *pro se* may create a spectacle and in turn humiliate himself).

<sup>102</sup> *Id.* at 165.

<sup>103</sup> See *id.* at 176–77.

<sup>104</sup> Moohr, *supra* note 84, at 1093.

virtually final.<sup>105</sup> As to post-arbitration proceedings, the availability of appeal is extremely limited compared to post-trial proceedings.<sup>106</sup> Specifically, any person who is adversely affected by an award made in an arbitration proceeding conducted under the Administrative Dispute Resolution Act must bring an action for review of an award pursuant to the Federal Arbitration Act, which allows appeals only in very limited circumstances.<sup>107</sup>

### *C. Missing Standards of Competency in Arbitration*

As seen, competency plays an important role in adjudicating claims, and its importance is recognized in both civil and criminal law. Because of the noted lack of procedural safeguards in arbitration, which a party would otherwise be given if its claim was adjudicated in court, incompetent persons who are forced to arbitrate a claim are at a huge disadvantage compared to competent parties. First, power imbalances exist between the parties. For example, because of a party's mental illness, there may be unequal cognitive capabilities and differences in intellectual or verbal capacity, which may lead to an inability to properly articulate a claim or explain a situation.<sup>108</sup> Therefore, proceeding with arbitration when a party lacks fundamental mental capacities may be inherently unfair to that party.<sup>109</sup>

Despite this general truth and despite the fact that arbitration is often mandatory and binding, the issue of mental competency of parties to arbitration proceedings has yet to be addressed. In fact, the only guiding

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<sup>105</sup> *Id.*

<sup>106</sup> Federal Arbitration Act § 10(a), 9 U.S.C. §10(a) (2006), provides that an arbitration award may be vacated: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators, or either of them; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

<sup>107</sup> 5 U.S.C.A. § 581(a) (1996), referring to 9 U.S.C.A. §§ 9–13 (stating that “any person adversely affected or aggrieved by an award made in an arbitration proceeding conducted under this subchapter may bring an action for review of such award only pursuant to the provisions of sections 9 through 13 of title 9”).

<sup>108</sup> See Connie J.A. Beck & Lynda E. Frost, *Competence as an Element of “Mediation Readiness,”* 25 CONFLICT RESOLUTION QUARTERLY 255, 258 (2007).

<sup>109</sup> *Id.* at 255.

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principle that exists is found in Chapter 2, Section 2.4.2 of the Arbitration Advocacy Handbook. In this handbook, the National Institute for Trial Advocacy lists “unfavorable situational indications for arbitration,” stating that:

A situation unsuitable for arbitration would be where a disputant, because of physical or mental disabilities, cannot effectively represent his or her best interests and will not be represented by counsel at the arbitration sessions. Such a dispute is probably best resolved in court, where a judge can appoint counsel or an appropriate representative, guardian, etc., and where the person will have available the full panoply of due process rights.<sup>110</sup>

In a similar vein, the field of mediation, another form of alternative dispute resolution, has failed to promulgate formal rules governing mental competency in a mediation proceeding.<sup>111</sup> Mediators have been criticized for relying on their “gut instinct” and rather vague guidelines which have been provided to them through model standards, as well as mediation scholarship which encompasses conflicting views.<sup>112</sup> However, even mediation, which is a voluntary and non-binding process,<sup>113</sup> has some standards to which mediators can look for guidance. While not all states have codified as state law the Model Standards of Conduct for Mediators, mediators can nonetheless look to these standards for guidance. Those standards state:

If a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and possible accommodations,

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<sup>110</sup> JOHN W. COOLEY & STEVEN LUBET, NAT’L INST. FOR TRIAL ADVOCACY, ARBITRATION ADVOCACY, § 2.4.2 (1997).

<sup>111</sup> See Beck, *supra* note 108, at 255 (articulating these concerns specifically in the context of mediation proceedings involving incompetent parties).

<sup>112</sup> *Id.* at 259–60 (proposing a specific legal standard for determining the minimum requirements for competency in the mediation process, stating that: “A person is incompetent to participate in mediation if he or she cannot meet the demands of a specific mediation situation because of functional impairments that severely limit: (1) [a] rational and factual understanding of the situation; (2) [a]n inability to consider options, appreciate the impact of decisions, and make decisions consistent with his or her own priorities; or (3) [a]n ability to conform his or her behavior to the ground rules of mediation . . .”).

<sup>113</sup> *What is Mediation?*, MEDIATE.COM, <http://www.mediate.com/articles/what.cfm>.

modifications, or adjustments that would make possible the party's capacity to comprehend, participate and exercise self-determination.<sup>114</sup>

As scholars have noted, "proceeding with mediation when a party lacks fundamental capacities is patently unfair to that party, who is thereby denied the protections of a . . . process designed . . . to protect vulnerable parties and ensure a just outcome."<sup>115</sup> Similarly, proceeding with an arbitration proceeding when a party to the proceeding lacks "fundamental capacities" is patently unfair to that party; and it further undermines the dignity of the arbitration process itself.

#### *D. Proposed Competency Standards in Arbitration: Why Dusky and Drope Should Apply*

As noted above, competency should be addressed and taken seriously in an arbitration proceeding. Actually assessing competency to arbitrate, however, will prove difficult without a clear, detailed standard. For that reason, it is helpful to draw on existing standards of competency in the field of criminal law as it is better developed than existing standards in civil law, and because it would provide a high standard for competency which would promote fairness. As noted on the United States Department of Justice website, "[t]he law governing mental health issues in the criminal context may inform . . . decision-making with respect to a determination of fundamental fairness."<sup>116</sup>

### V. ARBITRATION ORGANIZATIONS

As previously noted, assessing competency to arbitrate will prove difficult without a clear-cut and highly detailed standard. For this reason, a unifying legal standard is needed by which a party to an arbitration

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<sup>114</sup> *Model Standards of Conduct for Mediators* § VI (A)(10) (2005), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf) (noting that "[a] mediator shall conduct a mediation . . . in a manner that promotes . . . procedural fairness, [and] party competency . . . among all participants").

<sup>115</sup> Beck, *supra* note 108, at 255.

<sup>116</sup> See Executive Office of Immigration Review, *Mental Health Benchbook*, UNITED STATES DEPARTMENT OF JUSTICE, <http://www.justice.gov/eoir/vll/benchbook/tools/MHI/index.html>.

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proceeding can be judged mentally competent or ready to arbitrate based on a functional assessment of that party's capability.

However, this may be easier said than done. Because arbitration is a private process, there is no one governing body for arbitration; nor are there federal or state agencies that oversee arbitration procedures. The National Academy of Arbitrators, a professional organization of arbitrators, may be closest thing the field of arbitration has to a "governing body."<sup>117</sup>

The procedure of arbitration is often "administered" by a private provider organization that maintains lists of available arbitrators and provides rules under which the arbitration will be conducted.<sup>118</sup> While many provider organizations exist, the two main provider organizations that provide arbitration to private parties are JAMS and the American Arbitration Association. Both JAMS and the American Arbitration Association have adopted ethical codes of conduct for their arbitrators.<sup>119</sup> Similarly, the National Academy of Arbitrators, while not a provider organization, has also adopted standards of conduct.<sup>120</sup> Despite this fact, none of the organizations' ethical codes of conduct appear to address mental competency of the parties (although, ironically, competency of the arbitrator is addressed in each organization's ethical standards).<sup>121</sup> This note contends that because JAMS, The American Arbitration Association, and the National Academy of Arbitrators are the main arbitration organizations, and because they have already promulgated other ethical and procedural guidelines for arbitrators, these entities should also be charged with promulgating mental competency guidelines for the process of arbitration.

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<sup>117</sup> NATIONAL ACADEMY OF ARBITRATORS, <http://www.naarb.org/> (last visited September 17, 2011).

<sup>118</sup> See PARTRIDGE, *supra* note 63, at 69 (noting that service providers for Alternative Dispute Resolution generally include both public and private organizations which can be categorized as local, national, or international, and listing such organizations as JAMS and the American Arbitration Association).

<sup>119</sup> See *Arbitrators Ethics Guidelines*, JAMS, <http://www.jamsadr.com/arbitrators-ethics/>; see also *Statement of Ethical Principles*, AMERICAN ARBITRATION ASSOCIATION, <http://www.adr.org/sp.asp?id=22036>.

<sup>120</sup> See *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, NATIONAL ACADEMY OF ARBITRATORS, <http://naarb.org/documents/NAACODE07.pdf>.

<sup>121</sup> See *Arbitrators Ethics Guidelines*, *supra* note 119; see also *Statement of Ethical Principles*, *supra* note 119; see also *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, *supra* note 120.

A. *JAMS*

JAMS, originally an acronym for Judicial Arbitration and Mediation Services, was founded in 1979 and has since grown into the largest private Alternative Dispute Resolution provider in not just the United States, but the world.<sup>122</sup> At its inception, JAMS was made up of a panel of retired judges.<sup>123</sup> Today, JAMS is a private company made up of a diverse group of neutrals who provide arbitration, mediation, and other alternative dispute resolution services to parties who pay a fee.<sup>124</sup> JAMS also conducts workshops, seminars, and outside education programs for dispute resolution processes generally.<sup>125</sup>

In its ethical guidelines, JAMS notes that “an arbitrator should inform all parties of the role of the arbitrator and the rules of the arbitration process” and that “an arbitrator should ensure that all Parties *understand* the arbitration process.”<sup>126</sup> However, JAMS does not define what constitutes “understanding” under its ethical guidelines.<sup>127</sup> The guidelines therefore fail to specifically address parties who may have competency issues, and further fail to provide a course of action for an arbitrator who deems that a disputant does not “understand” the arbitration process.

B. *American Arbitration Association*

The American Arbitration Association (“the Association”) was founded in 1926 and is a private, not-for-profit provider of arbitration services that administers Alternative Dispute Resolution services from the filing of the case to closing.<sup>128</sup> The Association claims that it is “committed to innovation,” and also claims to “embrac[e] the highest standards of client service achievable in every undertaking.”<sup>129</sup> The Association further emphasizes its strong commitment to diversity, stating that “[o]ur integrity

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<sup>122</sup> PARTRIDGE, *supra* note 63, at 69.

<sup>123</sup> *About the JAMS Name*, JAMS, <http://www.jamsadr.com/about-the-jams-name/>.

<sup>124</sup> *See Arbitrators Ethics Guidelines*, *supra* note 119.

<sup>125</sup> PARTRIDGE, *supra* note 63, at 69.

<sup>126</sup> *Arbitrators Ethics Guidelines*, *supra* note 119 (emphasis added).

<sup>127</sup> *See generally id.*

<sup>128</sup> *Statement of Ethical Principles*, *supra* note 119; *see also* PARTRIDGE, *supra* note 63, at 69 (noting that the American Arbitration Association was founded shortly after the Federal Arbitration Act came into effect).

<sup>129</sup> *Statement of Ethical Principles*, *supra* note 119.



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demands impartial and fair treatment of all people with whom we come into contact.”<sup>130</sup>

The Association’s Statement of Ethical Principles includes such topics as conflict of interest avoidance, commitment to conflict management, confidentiality, diversity, financial integrity, impartiality, information disclosure, fairness standards, and ensuring an accessible process.<sup>131</sup> Interestingly, however, the Association does not impose any standards on its arbitrators for assessing a party’s level of mental competence before proceeding with the arbitration process.

Although the Association claims “accessib[ility] of process” and a commitment to treating “all people who [it] come[s] into contact [with]” fairly, the Association appears to be addressing accessibility and fairness simply in terms of monetary accessibility.<sup>132</sup> However, it is indisputable that a mentally-ill party to an arbitration will not have the same “accessibility” to the arbitration in terms of fully understanding the process, and will certainly not be treated fairly in comparison to the treatment of a mentally competent party to an arbitration.

### C. *National Academy of Arbitrators*

The National Academy of Arbitrators was founded in 1947 as a not-for-profit professional organization of arbitrators.<sup>133</sup> Operating both in the United States and Canada, National Academy arbitrators hear and decide thousands of arbitration cases each year in private industry as well as the public sector, focusing mainly on labor and employment arbitrations.<sup>134</sup> The National Academy notes that its standards are “rigorous in keeping with the goal of establishing and fostering the highest standards of integrity and competence.”<sup>135</sup>

In its Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, the National Academy notes that an arbitrator must “uphold the dignity and integrity of the office and endeavor to provide

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<sup>130</sup> *Id.*

<sup>131</sup> *See id.*

<sup>132</sup> *See id.* (noting that the Association has a “fee reduction or deferral process based on evidence of financial hardship, for parties who cannot afford to pay the AAA’s administrative fees.”).

<sup>133</sup> NATIONAL ACADEMY OF ARBITRATORS, *supra* note 117.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

effective service to the parties.”<sup>136</sup> Similar to JAMS and the American Arbitration Association, however, there are no requirements that arbitrators assess a disputant’s competency before proceeding with the arbitration, nor are the arbitrators given recourse if they do determine that a party is mentally incompetent. Therefore, while the National Academy claims to uphold the dignity and integrity of the process, it fails to recognize that allowing a mentally incompetent party to proceed with undermine the integrity of the process significantly.

#### VI. OPTIONS FOR INTEGRATION OF THE *DUSKY-DROPE* STANDARD OF COMPETENCY

As seen, the main arbitration organizations fail to address the issue of mental competency to an arbitration proceeding. JAMS comes the closest to addressing the issue by stating that the party to the proceeding must be able to “understand” the proceeding, but nevertheless provides no guidance to arbitrators for how to assess whether a disputant “understands” the process or how to proceed if the arbitrator believes the party lacks sufficient understanding to proceed.

This patchwork of ideas and standards results in an awkward and disjointed set of recommendations that are unlikely to provide fair evaluations of a potential disputant’s competence to proceed with arbitration. Despite the fact that competence is of particular concern in binding arbitration, a clear statement of the minimum requirements necessary for parties to arbitrate is nevertheless glaringly absent.

For these reasons, a party to an arbitration proceeding should not be forced to arbitrate unless that party has properly been deemed competent under specified competency standards. Further, arbitrators should be *required* by the institution for which they work to assess competency before arbitration procedures begin. Because criminal law provides a clear-cut test for mental competency under the *Dusky-Drope* standard, which is much easier to apply and understand than the disjointed standard set forth in civil law, the *Dusky-Drope* standard for assessing mental competency should be employed as this threshold standard in the arbitration context.

If the main arbitration agencies employed a *Dusky-Drope* standard, then an arbitrator would be forced, by their respective provider organizations, to make an assessment of a party’s competency before proceeding with the

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<sup>136</sup> *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes*, *supra* note 120.

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arbitration. A “reasonable person” standard should be employed here. Therefore, an arbitrator would not be able to move forward if he or she reasonably suspected that a party to the proceeding was incompetent to proceed, and would have a duty under the laws of the arbitrator’s provider organization to have that party evaluated prior to conducting the arbitration.

While the *Dusky-Drope* standard is closely tailored to criminal law, and assumes the constitutional right to assistance of counsel and the constitutional right of a defendant to assist in his own defense, the standard can nevertheless be tailored to the arbitration context. In the arbitration context, then, the standard would be such that if a party to an arbitration proceeding suffers from a mental disease or defect rendering him mentally incompetent to the point that he does not have a rational and factual understanding of the arbitration process; if the party is unable to either assist in or prepare his own case; or if the party is unable to consult with counsel (if obtained) with a reasonable degree of rational understanding, then the party shall be deemed incompetent to proceed with the arbitration.<sup>137</sup>

## VII. CONCLUSION

Arbitration, a unique form of alternative dispute resolution, is endorsed by the legal system as being a fair and just proceeding that is an appropriate alternative to civil litigation. Civil litigation, however, employs competency standards that are imposed by Federal Rule of Civil Procedure 17, which disallows a party to sue or be sued if that party is mentally incompetent to proceed. Contract law, a subdivision of general civil law, does not employ specific competency standards. However, contract law is concerned with competency as a general concept, especially in the context of contract formation. Arbitration, however, seems to ignore the concept of mental competency and lacks specific competency standards similar to those employed in the civil and criminal context.

Proceeding with an arbitration when a party to the process lacks fundamental mental capacities is unfair to the party and runs counter to the central values of the American judicial process, which has been designed to protect vulnerable parties and ensure a just outcome. If arbitration proceedings continue without employing competency standards, persons who would be declared mentally incompetent under civil competency standards will nevertheless be forced to adjudicate claims in an arbitration proceeding. This can lead to unjust outcomes, which are nevertheless binding on parties

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<sup>137</sup> See generally *Dusky v. United States*, 362 U.S. 402 (1960); see also *Drope v. Missouri*, 420 U.S. 162 (1975).

and which are most likely unappealable. As the Supreme Court noted, the bar against trying an incompetent defendant is certainly “fundamental to an adversary system of justice.”<sup>138</sup>

By creating a uniform standard for a minimally required level of competence to arbitrate, arbitrators can ensure that the proceedings will be more just and applied more consistently to all parties involved. Because arbitration provider organizations already require their arbitrator-employees to abide by certain ethical standards and guidelines, those same provider organizations should similarly provide mental competency training to arbitrator-employees. Also, because the competency standard in criminal law is so clear-cut, the *Dusky-Drope* standard should be employed to assess competency in the context of arbitration proceedings. Although using such a standard raises important questions such as who is responsible for supplying psychologists and psychiatrists to actually perform the assessments, provider organizations, parties to the arbitration, and the states are well-equipped to construct answers to such inquiries.

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<sup>138</sup> *Drope*, 420 U.S. at 172.